

EXHIBIT 123

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 Civil Action No. 1:14-cv-14176-ADB

4 _____
5 STUDENTS FOR FAIR ADMISSIONS, INC.,

6 Plaintiff,

7 v.

8 PRESIDENT AND FELLOWS OF

9 HARVARD COLLEGE

10 (HARVARD CORPORATION),

11 Defendant.
12 _____

13
14 HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

15
16 DEPOSITION of MICHAEL SMITH

17 Boston, Massachusetts

18 April 23, 2018
19

20
21
22 Reported by:

23 Dana Welch, CSR, RPR, CRR, CRC

24 Job Number: 140867
25

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2 plans to step down?

3 MS. ELLSWORTH: Object to the form.

4 A. I do not.

5 Q. Do you know if Sally Donohue has any plans
6 to step down?

7 MS. ELLSWORTH: Object to the form.

8 A. Sally Donohue has announced that she's
9 retiring.

10 Q. Do you know when that will happen?

11 A. Not specifically. I don't remember the
12 date.

13 Q. Do you know if Marlyn McGrath has any
14 plans to step down?

15 MS. ELLSWORTH: Object to the form.

16 A. I don't know.

17 Q. How long have you been at Harvard?

18 A. I passed my 25-year anniversary back in
19 November. 1992.

20 Q. I was told there wouldn't be math.

21 Since 1992, have you served on any
22 committees?

23 A. I have.

24 Q. And can you tell me the committees you've
25 served on?

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2 MR. CONNOLLY: Can we go off the record.

3 (Proceedings interrupted at 9:19 a.m. and
4 reconvened at 9:39 a.m.)

5 (Exhibit 2, HARV00097310 - 97328, marked
6 for identification.)

7 BY MR. CONNOLLY:

8 Q. I am introducing as Exhibit 2, a document
9 with the Bates number ending in 97310, with the
10 title Report of the Committee to Study Race Neutral
11 Alternatives.

12 Do you recognize this report?

13 A. I do.

14 Q. And what is it?

15 A. I believe it is the final report of the
16 committee that was put together, as it says in the
17 title, to study race neutral alternatives.

18 Q. Were you on this committee?

19 A. I was.

20 Q. Who else was on the committee that created
21 this report?

22 A. There are three members of the committee,
23 all listed on page whatever it is -- page 19:
24 William Fitzsimmons, who's our dean for admissions
25 and financial aid; Rakesh Khurana, who's the dean

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2 for Harvard College; and then myself, who was the
3 chair of the committee.

4 Q. Whose idea was it to create this
5 committee?

6 MS. ELLSWORTH: Object to form.

7 A. The committee came out of a conversation
8 amongst myself, the president of the university,
9 and our counsel.

10 Q. And which counsel was that?

11 A. Combination of the in-house, office of
12 general counsel, and consultation with WilmerHale.

13 Q. Who in particular in the office of general
14 counsel?

15 A. I believe it was Bob Iuliano. And at some
16 other conversations, Ara Gershengorn was there,
17 too; I couldn't say which ones.

18 Q. And which attorneys at Wilmer?

19 MS. ELLSWORTH: Object to the form.

20 A. I couldn't say who was at the first
21 conversation from WilmerHale.

22 Q. Was this an in-person meeting when this
23 decision to create this committee was made?

24 MS. ELLSWORTH: Object to the form.

25 A. As far as I remember, it was in person.

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2 Q. Where was the meeting?

3 A. In University Hall.

4 Sorry, take that back. In Mass Hall.

5 Sorry. Wrong building.

6 Q. And that's on Harvard's campus?

7 A. Correct.

8 Q. When did this meeting occur?

9 A. Sometime in the June time frame of last
10 year.

11 Q. Before that time frame, had you had any
12 discussions with anyone about creating this
13 committee?

14 MS. ELLSWORTH: Objection. I'll remind
15 the witness not to reveal communications with
16 counsel in answering the question. But otherwise,
17 you may answer the question.

18 A. The only conversations we had about
19 creating a committee were with counsel.

20 Q. When was the first time you had a
21 conversation about creating this committee?

22 MS. ELLSWORTH: Objection, asked and
23 answered.

24 A. To the best of my recollection, it was in
25 the June of 2017 time frame when we were talking

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2 about constituting this specific committee.

3 Q. When was the first time you had a
4 conversation about creating any committee to
5 examine the availability of race neutral
6 alternatives at Harvard?

7 MS. ELLSWORTH: Object to the form.

8 A. All conversations that we've had about
9 putting a committee together at the university have
10 been with counsel. The time frame is uncertain to
11 me because it has been raised over time as the
12 university has thought about how to proceed in this
13 space.

14 Q. Did you ever discuss putting together a
15 committee to examine the availability of race
16 neutral alternatives before November of 2014?

17 MS. ELLSWORTH: One second, please. I'll
18 object to the form.

19 You may answer the question, but as
20 always, please don't reveal the substance of any
21 communications with counsel. But the question is
22 when or a timing question. You can answer that if
23 you're able.

24 A. I have -- I don't have any recollection of
25 specific times when the university has, with

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2 Q. Which individuals were at this committee?

3 MS. ELLSWORTH: Object to the form.

4 A. I'm not sure I understand your question.

5 Q. Yeah. Let me rephrase it.

6 Which individuals attended the meetings
7 related to this committee?

8 MS. ELLSWORTH: Object to the form.

9 A. When we had committee meetings, three
10 individuals were always there: myself, Dean
11 Fitzsimmons, Dean Khurana. And then we had a range
12 of members of counsel at different meetings, not
13 necessarily always the same individuals, and
14 sometimes we had a guest who was there to present
15 information to the committee.

16 Q. So which individuals from the office of
17 general counsel at Harvard ever attended a meeting?

18 A. Bob Iuliano was there for some, Ara was
19 there for some. I couldn't say for certain if any
20 other members of our office of general counsel or
21 in-house counsel were there.

22 Q. And which individuals from WilmerHale
23 attended these meetings?

24 MS. ELLSWORTH: Object to the form.

25 A. Felicia, Drew, and other members who I

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2 alternatives outside of the presence of counsel?

3 A. No. I have been very careful to make sure
4 -- and committees should be running this way --
5 that the discussions that take place are
6 discussions with the entire counsel there so that
7 all members of the committee benefit from the
8 discussion.

9 Q. To be clear, attorneys were not officially
10 members of the committee; is that right?

11 A. That is right.

12 Q. Have you ever exchanged e-mails about the
13 availability of race neutral alternatives in which
14 counsel from Harvard was not included on the
15 e-mail?

16 MS. ELLSWORTH: Object to the form. Time
17 frame? Do you mean in connection with the
18 committee or...

19 Q. Since June 2017.

20 THE WITNESS: So do you mind reading the
21 question?

22 Q. I can try again.

23 Since the committee was formed, did you
24 ever exchange e-mails where the topic was the
25 availability of race neutral alternatives and

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2 counsel was not included on the e-mail?

3 A. There's one recent e-mail exchange in
4 which I remember not including counsel, and that
5 was on one of the drafts, early work on one of the
6 drafts that was being exchanged between Dean
7 Fitzsimmons, Dean Khurana, and myself as we were
8 passing the document back and forth to be edited.
9 Counsel happened not to be on that one.

10 Q. Is that the only e-mail you can recall?

11 MS. ELLSWORTH: Object to the form.

12 THE WITNESS: I'm not sure what that
13 means. Is that something I should be --

14 MS. ELLSWORTH: Oh, I'm sorry. I object
15 to the form. You can answer. Sorry.

16 THE WITNESS: I'm sorry. I thought you
17 said check to the form. Sorry.

18 A. I can't recall anything else that was done
19 without including counsel.

20 Q. When did you reach your conclusions as a
21 committee?

22 A. I like to approach these questions with a
23 very open mind. So from my perspective, it was not
24 until after we had received the last expert witness
25 report and we started to then have our discussions

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2 within committee about what our report would look
3 like, how we were addressing each one of the race
4 neutral alternatives that have been considered, how
5 does it play off against the criteria that we had
6 decided upon as we move forward. And that
7 discussion took place in committee.

8 And we then worked our way toward
9 consensus, produced early drafts, and continued
10 discussion of the different alternatives as the
11 draft started to represent what the committee as a
12 whole thought.

13 And so I would say, to answer your
14 question, it was very near the end of the process
15 by the time the committee had decided its mind
16 about the different race neutral alternatives.

17 Q. Had you reached tentative conclusions
18 before that?

19 A. I did not run the committee where I was
20 asking members of the committee to state their
21 opinions about the different race neutral
22 alternatives and whether they would be appropriate
23 for Harvard early in the process. Certainly some
24 of that might come out as we had our discussions.
25 But I feel strongly that I should not be asking

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2 people to make up their minds before all the data
3 appeared.

4 Q. Had you personally made any tentative
5 conclusions before, I think you said, the second to
6 last committee meeting?

7 A. I had not. I approached it with a very
8 open mind, more than willing to see if there was an
9 alternative that we should be thinking about using
10 at Harvard.

11 Q. During your committee meetings, was there
12 ever any disagreement among you, Dean Khurana, or
13 Dean Fitzsimmons?

14 A. Disagreement in what way?

15 Q. Disagreement as to any matter of substance
16 that you were analyzing.

17 MS. ELLSWORTH: Object to the form.

18 A. I think in trying to answer your question,
19 I would say that it's my opinion each of us took
20 the assignment that we had extremely seriously. We
21 looked through the material. We had questions
22 about how different race neutral alternatives might
23 change the way we approach things, and so we
24 debated that. I'm not sure I would ever go to
25 characterize it as disagreements. But we each

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2 A. Again, I don't know exactly which members
3 of our counsel were involved in pulling together
4 the first draft.

5 Q. And just to be clear, do you know whether
6 any individuals from WilmerHale assisted in the
7 drafting of this report?

8 MS. ELLSWORTH: Object to the form.

9 A. Again, I don't know who was involved. I
10 can tell you that the committee discussed the
11 report in a number of our meetings and how we would
12 like to see it put together. And then, as is
13 typically done in a Harvard committee like this,
14 the person staffing the meeting usually pulls the
15 first draft so that the committee has something to
16 react to. Whether it was just -- at that time, I
17 think it was Drew that was taking notes. Whether
18 it was just Drew or not, I can't say for certain.

19 Q. So for whoever was drafting the initial
20 report, how did the committee convey what it wanted
21 to be drafted?

22 A. I think it gets conveyed through multiple
23 avenues. First of all, the committee had a number
24 of different discussions that were captured through
25 the notes as we went through. And we reviewed some

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2 of those different race neutral alternatives in
3 multiple meetings, coming to a preliminary kind of
4 outcome after we thought about it.

5 And then we spent time, I think, in at
6 least two committee meetings talking about how we
7 would go from where we were to producing a report.
8 And so those discussions, counsel was there and the
9 staff were there to hear how the committee's
10 thinking about it.

11 And then the way typically the university
12 committees work, somebody goes off and pulls it
13 together. And then the committee members get the
14 report back, and we react it to, and we make
15 changes to it, and we edit it, and that
16 collaborative effort ends up with the final report.

17 Q. So someone, at some point, must have said
18 we're going to go draft this report.

19 MR. CONNOLLY: Let me phrase this as a
20 question.

21 Q. Did anyone ever tell you that a particular
22 individual was going to take the initial steps of
23 drafting this report?

24 MS. ELLSWORTH: Object to the form.

25 A. I would say it actually happened the other

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2 way, where I finally said, okay, the committee
3 needs a draft of this report that we've been
4 discussing. Could we please have it before the
5 next committee meeting.

6 I did not ask, knowing where you're going,
7 to a particular individual that I would like it to
8 be written by you.

9 Q. So do you remember a committee where you
10 asked for this report to be drafted?

11 MS. ELLSWORTH: Object to the form.
12 Committee meeting I think you mean.

13 Q. Committee meeting.

14 A. I do remember asking or stating that I
15 think it is time for us to have a draft at our next
16 committee meeting. I couldn't tell you off the top
17 of my head exactly which one it was, but it was one
18 of the ones toward the end.

19 Q. And did anyone respond in the affirmative
20 that they would get you a draft of this initial
21 report?

22 MS. ELLSWORTH: Objection.

23 A. To the best of my recollection, many
24 people did. I wish I could be easier with your
25 question, but that's the truth.

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2 Q. So which individuals do you remember
3 telling you that the committee will soon have a
4 draft of the report?

5 A. I honestly have a hard time remembering
6 who exactly is in each of our meetings. I can --
7 best of my recollection is that a number of the
8 individuals in that meeting, not of the committee
9 meeting, but the counsel said, sure, we'll get you
10 a draft for next time.

11 Q. Do you recall anyone in particular telling
12 you that you would have a draft soon?

13 MS. ELLSWORTH: Objection, asked and
14 answered.

15 A. I'm sorry, since I wasn't thinking about
16 asking a particular person, I wasn't looking to see
17 that a particular person answered me.

18 Q. When did you first see a draft of this
19 report?

20 A. I can't say for certain the date when I
21 saw the first draft.

22 Q. Do you have a month?

23 A. It was either March or April. And
24 hopefully it is made more clear through the agendas
25 when we stopped talking about the need to produce

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2 Q. Which individuals do you believe assisted
3 in creating the first draft of this report?

4 A. So my understanding is that Drew and Ara
5 had a hand in the first draft.

6 Q. And just so the record is clear, Ara
7 Gershengorn? Are you referring to Ara Gershengorn?

8 A. I am.

9 Q. And does she work at Harvard's office of
10 general counsel?

11 A. She does, as far as I understand.

12 Q. When you say Drew, are you referring to
13 Andrew Dulberg?

14 A. I am.

15 Q. And does he work at WilmerHale?

16 A. As far as I understand.

17 Q. I'm sorry. Is he an attorney at
18 WilmerHale?

19 A. As far as I understand.

20 Q. Any other individuals in addition -- are
21 you aware of any other individuals that assisted in
22 the drafting of this initial report?

23 MS. ELLSWORTH: Object to the form.

24 A. I do not know if others assisted in the
25 drafting.

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2 so?

3 A. I believe we cc'd counsel.

4 Q. How many drafts do you recall receiving of
5 this report?

6 MS. ELLSWORTH: Object to the form.

7 A. It depends on how you're asking that
8 question. I would say we received one initial
9 draft, and then the committee worked on it and had
10 several drafts produced through work of the
11 committee.

12 Q. Once you received the initial draft, did
13 counsel suggest any other -- suggest or make any
14 other changes to the report?

15 MS. ELLSWORTH: Object to the form.

16 A. Certainly toward the end of the process --
17 I ran a very open committee meeting in which I was
18 taking suggestions from not only members of the
19 committee, proper members of the committee, but
20 also any thoughts that happened to come out of
21 counsel that were in the room. And we had shared a
22 draft of the report with the president, and the
23 president had sent back some suggested edits.

24 Q. Did she send back suggested edits through
25 a hard copy?

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2 A. I believe so.

3 Q. Did you ever have --

4 MR. CONNOLLY: Strike that.

5 Q. When you were reviewing these drafts, did
6 you make edits, suggestions, or comments on the
7 document, either electronically or in hard copy?

8 A. Simple answer, yes.

9 Q. Were you aware that your notes and
10 comments would be produced through this litigation?

11 MS. ELLSWORTH: Object to the form.

12 A. It was my understanding that whatever we
13 did during this committee, including edits and
14 notes that we made on documents, could be shared
15 with you, opposing counsel.

16 Q. When was the report finalized?

17 A. May I look at it?

18 Q. Yes.

19 A. Sometime in April 2018. Clearly we didn't
20 put a day on it. There's no day on it.

21 Q. Did the committee have the final version
22 of this report at its last meeting?

23 A. We did not have -- as best of my
24 recollection, we did not have the final version at
25 its last committee meeting.

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2 Q. Do you know why you did not have the final
3 version?

4 A. I do.

5 Q. Why is that?

6 A. We had an extensive meeting where we went
7 through what we hoped would be the last sets of
8 edits, one at a time, paragraph by paragraph. To
9 the best of my recollection, we had one section
10 toward the back that instead of trying to edit that
11 short section in committee, we would have that
12 section be cleaned up and sent to all the committee
13 members. And then the committee members would give
14 that final okay, though we had given our support
15 for the rest of the document at that point.

16 Q. Do you know which individuals were going
17 to write this new language?

18 MS. ELLSWORTH: Object to the form.

19 A. To the best of my understanding, it was
20 going to be Drew.

21 Q. Do you recall the substance of this final
22 issue that Drew was rewriting?

23 A. I will admit my memory isn't perfect, but
24 I believe it was the paragraph on page 17 or
25 whatever you call the other number, 97326, the

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2 paragraph starting "the practice of deferred
3 admission."

4 Q. Do you recall the change he was going to
5 make?

6 A. As I mentioned, there wasn't a specific
7 set of words that he was going to just insert. It
8 was a discussion that we had with respect to that
9 paragraph and then an editing of the paragraph to
10 make sure it said what we had discussed.

11 But there was a process put in place to
12 make sure that whatever -- if it was Drew -- did,
13 that each of the committee members had another
14 opportunity to read through it and state if they
15 agreed with it or not.

16 Q. So how did the final vote on this report
17 occur?

18 MS. ELLSWORTH: Object to the form.

19 A. So we did not take formal vote. But as I
20 mentioned, we went through what we hoped would be
21 the last version of the report with the sets of
22 edits each of us had, which were hopefully small,
23 made decisions on each of those edits, having gone
24 through the report paragraph by paragraph, hit that
25 one section, to the best of my recollection, and

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2 decided it was not appropriate for us to try and
3 decide and finalize that one there in committee,
4 but to allow us to have a bit more time with it.
5 But then I had an explicit ask of each of the
6 members of the committee if they agreed with the
7 rest of the report, and they told me yes.

8 Q. So the other members of the committee
9 never officially signed off on the explicit
10 language in this final report; is that correct?

11 MS. ELLSWORTH: Objection.

12 A. I would say that they did. Maybe I misled
13 you there.

14 We went through, we made all the changes
15 we were making, pulling that one paragraph out to
16 be held. And then I turned to each committee
17 member one at a time and said, do you have any
18 other changes, do you accept the report as it is
19 written. And I got a yes. And then I turned to
20 the next person, asked the same set of questions to
21 him. And then stated my opinion.

22 Q. But the final paragraph had yet to be
23 written when those --

24 A. Yes.

25 Q. Sorry. The final paragraph had yet to be

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2 So based on what you just said, it sounds
3 like you do not have a plan to keep this report
4 confidential; is that correct?

5 MS. ELLSWORTH: Object to the form.

6 A. For me personally, I do not have any such
7 plans.

8 MR. CONNOLLY: All right. Shall we break?

9 MS. ELLSWORTH: Yes.

10 (Proceedings interrupted at 12:03 p.m. and
11 reconvened at 12:40 p.m.)

12 MS. ELLSWORTH: And the parties just
13 wanted to put a clarification on the record that
14 this deposition, while it is not a 30(b)(6)
15 deposition, Dean Smith is being offered and is
16 prepared to testify in his capacity as chair of the
17 committee to study race neutral alternatives and is
18 being presented in that capacity today. He's
19 prepared to talk about the work that the committee
20 did.

21 MR. CONNOLLY: That's correct.

22 BY MR. CONNOLLY:

23 Q. Do you recall any meetings of this
24 committee in which an individual from the office of
25 general counsel was not at the committee?

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2 A. Yes.

3 Q. Do you know how many committees that
4 was -- or how many meetings that would have
5 happened?

6 A. I can certainly recall one.

7 Q. Do you know the reason why someone from
8 the office of general counsel was not there?

9 MS. ELLSWORTH: Object to the form.

10 A. I couldn't state why the office of general
11 counsel chose not to come.

12 Q. At that meeting, was there an attorney
13 from WilmerHale at that meeting?

14 A. No.

15 Q. So at this meeting, there were no counsel
16 present; is that correct?

17 A. Yes.

18 Q. Did that happen more than once?

19 MS. ELLSWORTH: Object to the form.

20 A. I don't recall any other meetings without
21 counsel.

22 Q. Do you know why counsel was not present at
23 that meeting?

24 MS. ELLSWORTH: Object to the form.

25 A. I do not know why they chose not to come.

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2 Q. Did any counsel dial in through a
3 conference call for this meeting?

4 A. No.

5 Q. So did anyone take notes at this meeting?

6 A. There was a meeting in which we discussed
7 a draft of the report, and we took notes on the
8 draft.

9 Q. And so at this meeting, was it just you,
10 Dean Khurana, and Dean Fitzsimmons?

11 A. That's correct.

12 Q. Do you recall when this meeting was?

13 A. Sometime in the spring: February, March,
14 April. I'm not sure which of the meetings.

15 Q. To be clear, aside from this one meeting,
16 do you recall any other meetings in which no
17 counsel was present?

18 A. I do not.

19 Q. You said at this meeting you discussed the
20 draft; is that correct?

21 A. Yes.

22 Q. And how did you take notes about the
23 draft?

24 A. So how did we take notes about the draft?

25 Q. Or if that's not clear, how did you edit

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2 or provide comments about the draft? Was it in
3 hard copy? Was it through -- did you have access
4 to Microsoft Word? How did you do it?

5 MS. ELLSWORTH: Object to the form.

6 A. So Dean Khurana took notes on the, I'm
7 assuming it was Microsoft Word version of the
8 draft.

9 Q. Did he have a laptop?

10 A. He did.

11 Q. Anyone else have a laptop?

12 A. I do not recall seeing Dean Fitzsimmons
13 with a laptop, and I had my iPad.

14 Q. Were you providing any edits or comments
15 on the draft on your iPad?

16 A. I had made marks on my iPad that I then
17 communicated to Dean Khurana as we went through the
18 draft.

19 Q. So was Dean Khurana in charge of pulling
20 together everybody's comments and putting them into
21 one document?

22 A. He was -- he had volunteered to take the
23 notes as we went through our discussion, and as we
24 were concluding the meeting we all decided that he
25 would take the next pass at edits based on our

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2 conversation.

3 Q. Do you know what the Ryan committee is?

4 A. If you're referring to the committee that
5 was chaired by Dean Ryan to consider race neutral
6 alternatives, yes.

7 Q. And what is your understanding of the
8 purpose of that committee?

9 A. My understanding was that committee was
10 tasked to look at race neutral alternatives with
11 respect to admissions across the university.

12 Q. Were you on the Ryan committee?

13 A. I was not.

14 Q. When did you first learn about the
15 existence of the Ryan committee?

16 A. I can't say for certain when it was from a
17 calendar year point of view.

18 Q. Did you learn about the Ryan committee
19 after this litigation was initiated?

20 A. No.

21 Q. So I take it you were aware of the Ryan
22 committee before the complaint was filed in this
23 case?

24 MS. ELLSWORTH: Object to the form.

25 A. As I remember the timing of the two

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2 Q. Yes.

3 Have you ever heard of the practice of
4 deferred admission being referred to as the Z list?

5 A. I have. Though we have through the end of
6 this process talked about it as deferred admission
7 and not the Z list, hence my confusion.

8 Q. Can you tell me what the practice of
9 deferred admission is at Harvard?

10 A. I can tell you in general. I'm not
11 involved in the day-to-day aspects of it. But it
12 is the, in general, admitting of a student not for
13 the incoming class, but for a subsequent class,
14 typically a year later, so that student has time to
15 take a gap year, which quite a bit of literature --
16 I'm not an expert on it -- has stated that this is
17 a benefit for a number of students coming out of
18 high school to take time before they head off to
19 college so that they are better prepared to take
20 advantage of the opportunities that college
21 presents to them.

22 Q. Did you ever examine what would happen to
23 the level of racial diversity at Harvard if Harvard
24 stopped the practice of deferred admission in
25 addition to stopping the use of race?

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2 question.

3 A. I do not sit in the meetings, but as far
4 as I understand, the circumstances around an
5 applicant's background is taken into account in
6 reviewing their standardized scores.

7 Q. Does Harvard seek to maximize the SAT
8 scores of its admitted class?

9 MS. ELLSWORTH: Object to the form.

10 A. Not as far as I understand.

11 Q. And was it the view of the committee that
12 it should?

13 A. That was not a goal of the committee.

14 (Exhibit 3, HARV00072381 - marked for
15 identification.)

16 MR. CONNOLLY: Mark as Exhibit 3 a
17 document with the Bates number ending in 72381.

18 Q. Do you recognize this document?

19 A. I do.

20 Q. Did you draft this document?

21 A. As far as I recall, I didn't draft the
22 first version of it, but I edited it before it went
23 out.

24 Q. Do you know who drafted the first version?

25 A. I couldn't say for certain.

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2 drafting.

3 Q. And do you recall what the discussion was?

4 A. There was some conversation with respect
5 to the timing of the final report and how that
6 might intersect with needs of the ongoing
7 litigation. There was discussion of the
8 alternatives that we would think about including in
9 the report. And then the kinds of things that you
10 see in item 3 here, as I recall, simply in order
11 for us to be able to proceed with the production of
12 a final report, would we need any other information
13 that would have impact on how we put together our
14 final report.

15 (Exhibit 10, HARV00097002, marked for
16 identification.)

17 MR. CONNOLLY: Mark as Exhibit 10 a
18 document with a Bates number ending 97002. It is
19 an agenda for a meeting to take place on
20 March 23rd, 2018.

21 A. Okay.

22 Q. Do you recall this meeting?

23 A. I do.

24 Q. Was counsel at this meeting?

25 A. I believe this is the meeting at which

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2 counsel was not there. It was only members of the
3 committee.

4 Q. Is this a committee where the three of you
5 reviewed and commented on a draft of the report?

6 MS. ELLSWORTH: Object to the form. I
7 think you meant "meeting" in your question.

8 Q. Is this the committee meeting where the
9 three of you commented and suggested edits to the
10 draft of the report?

11 A. To the best of my recollection, this was a
12 committee meeting where we both discussed, as it
13 says here, the Card rebuttal report, and we had
14 received a first draft of the final report, and we
15 did take steps to edit it, and then as we talked
16 about earlier, decided who was going to have the
17 document to do the next edits and how we would pass
18 it through the committee.

19 Q. So what were the steps that you took after
20 this meeting as far as reviewing the draft? Did it
21 go to somebody else?

22 MS. ELLSWORTH: Object to the form of the
23 question.

24 A. So as I mentioned, we took time -- if you
25 don't mind, I'll start in the meeting.

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2 We took time in the meeting to have a
3 general discussion about the report and how we saw
4 it, where it was strong, where we would like to see
5 changes overall without pinpointing specific
6 paragraphs or words. We also spent some time in
7 that meeting talking about specific omissions,
8 places that we thought the report needed to be
9 expounded, other places that we thought about
10 reorganizing it.

11 Then we did a front to back walkthrough of
12 the report, making some of those edits that we
13 could, or putting notes into the report so that as
14 a committee we had recorded the kinds of work that
15 we had done.

16 And then to get to your specific question,
17 then at the end of the meeting, I suggested to the
18 committee that Dean Khurana take the first detailed
19 pass at incorporating the kinds of discussions that
20 we had at a global level, feeding in the comments
21 from the bubbles, since I'm not a big fan of doing
22 a lot of text changes in committee.

23 And when he was done with that, pass it to
24 me. I would then add some smaller things that I
25 had written down and discussed with the committee

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2 Q. Do you recall whether this was the draft
3 that the committee took into its final meeting to
4 review?

5 MS. ELLSWORTH: Object to the form of the
6 question.

7 A. To the best of my recollection, this is
8 the draft that each of us reviewed with the
9 expectation we were coming in to make as close as
10 we could, if we all agreed, our final edits.

11 Is that your question?

12 Q. Yes.

13 If you could pull out Exhibit 2 again.
14 Turn to page 14. Do you see the paragraph starting
15 "using socioeconomic status"?

16 A. Yes.

17 Q. So I notice that that paragraph is not in
18 the near final version of the draft we were just
19 looking at.

20 Was this one of the paragraphs that
21 Mr. Dulberg wrote after the conclusion of your
22 April 6th meeting?

23 MS. ELLSWORTH: Object to the form.

24 A. Best of my recollection, this is not the
25 paragraph that I was talking about earlier. This

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2 was, to the best of my recollection, a paragraph
3 that we talked about in the committee.

4 Q. So do you know who typed up this language?

5 A. If you're asking me who was doing the
6 edits while we were talking about it, it was Drew.

7 Q. Do you know why you inserted this
8 paragraph on the last day of your committee?

9 A. I couldn't say for certain because it was
10 not one of the edits that I had talked about, if I
11 recall correctly. It came from one of the other
12 committee members.

13 Q. Are you familiar with the report of the
14 Harvard Presidential Task Force on Inclusion and
15 Belonging?

16 A. If that's the one that just was released a
17 couple of weeks ago, that's not the form I have it
18 in. Mine looks like a booklet, two pages on,
19 that's the one I got, I think. I have a small
20 booklet, that's my version. Could be the same
21 thing in a different format.

22 Q. Okay. So let me try again.

23 Are you familiar with the Harvard
24 University Presidential Task Force on Inclusion and
25 Belonging?

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2 review?

3 A. So as I believe I answered to begin with,
4 it was a collaborative effort among counsel.

5 Q. And you testified, I believe, that it is
6 your general practice when you chair a committee,
7 to staff that committee with individuals who might
8 be responsible for generating certain documents
9 reflecting the work of the committee; is that
10 correct?

11 A. Yes.

12 Q. And is that how you organized the work of
13 this committee as well?

14 A. Yes.

15 Q. Is it typical practice for you to staff a
16 committee with individuals who are not committee
17 members, but who are responsible for memorializing
18 the work of the committee in initial drafts of a
19 report?

20 A. Yes.

21 Q. Does the process that you employed with
22 this committee to study race neutral alternatives
23 differ from the process that you have followed with
24 other committees that you've chaired?

25 A. No.

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2 Q. Would the process that you followed with
3 this committee have been any different from your
4 point of view had the committee been staffed with
5 non-committee members, but who were not attorneys?

6 A. No.

7 Q. Does the work of the committee and the
8 final report -- the deliberations --

9 MS. ELLSWORTH: Strike that.

10 Q. Does the final report that the committee
11 generated reflect the three committee members'
12 judgment on the issue that the committee was
13 charged with considering?

14 A. I absolutely believe so.

15 MS. ELLSWORTH: Nothing further.

16 MR. CONNOLLY: Five minutes for me.

17 (Proceedings interrupted at 5:25 p.m. and
18 reconvened at 5:36 p.m.)

19 EXAMINATION

20 BY MR. CONNOLLY:

21 Q. You mentioned just now that President
22 Faust gave oral comments to the committee; is that
23 correct?

24 MS. ELLSWORTH: Object to the form.

25 A. What I was trying to say is that the

CERTIFICATE

Commonwealth of Massachusetts
Suffolk, ss.

I, Dana Welch, Registered Professional
Reporter, Certified Realtime Reporter and Notary
Public in and for the Commonwealth of
Massachusetts, do hereby certify that MICHAEL
SMITH, the witness whose deposition is hereinbefore
set forth, was duly sworn by me and that such
deposition is a true record of the testimony given
by the witness.

I further certify that I am neither related
to nor employed by any of the parties in or counsel
to this action, nor am I financially interested in
the outcome of this action.

In witness whereof, I have hereunto set my
hand and seal this 27th day of April, 2018.

Dana Welch

Notary Public

My Commission Expires:

September 13, 2024